IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 434.

FIREMEN'S INSURANCE COMPANY, A CORPORATION, COMMERCIAL UNION ASSURANCE COMPANY, LIMITED, A CORPORATON, AMERICAN EQUITABLE ASSURANCE COMPANY, A CORPORATION, SECURITY INSURANCE COMPANY, A CORPORATION, THE STANDARD FIRE INSURANCE COMPANY OF NEW JERSEY, A CORPORATION, THE HOME INSURANCE COMPANY, A CORPORATION, PHILADELPHIA FIRE AND MARINE INSURANCE COMPANY, A CORPORATON,

Petitioners,

vs.

MAX EDLIN,

Respondent.

REPLY BRIEF OF PETITIONERS.

RESPONDENT'S BRIEF PRESENTS THREE GLARING INSUFFICIENCIES.

1.

Respondent's Brief Fails to Challenge the Three Grounds Urged for the Granting of the Writ. Respondent Merely Presents a Premature Argument Upon Matters Having Relevance Only If Certiorari Is Granted.

The petition for certiorari is predicated upon three grounds, all of which are within the purview of Rule 19 of

this Court, showing that Judge Finnegan's decision below is:

1. A flagrant departure from settled procedure and settled law (Petition, Point I, pages 8 to 14).
2. In conflict with decisions of Courts of Appeal of other circuits (Petition, Point II, pages 14 to 22).
3. In conflict with applicable Illinois law (Petition, Point III, pages 22 to 31, and Appendix, pages xiii to xx).

Respondent ignores the manifest fact that the only question for present determination is whether valid reasons are shown for the issuance of the writ. Respondent's answering brief is almost entirely dedicated to an argument directed to the merits of the controversy which would be the subject of consideration if certiorari is allowed by this Court. However, this argument is premature. As the matter now stands, respondent has wholly failed to effectively challenge or dispute any of the three grounds which petitioners urge for the granting of the writ of certiorari.

Under proposition I of the petition, petitioners have demonstrated that the majority opinion rendered by the divided Court of Appeals below, by flagrantly violating the accepted rules governing the admission of evidence in arson cases, has so far departed from accepted procedure and settled law as to warrant further review by this Court.

Respondent makes no attempt to distinguish or show inapplicability of any of the authorities we have cited in support of the grounds urged for the granting of the writ. We respectfully submit that respondent's careful and almost studied abstention in this regard amounts to a concession of the validity of petitioners' proposition I.

Further, respondent does not challenge the gravamen of proposition II urged by petitioners. Proposition II demonstrates that Judge Finnegan has applied Federal Rule 61 in direct conflict with its spirit and purpose, and in

direct conflict with its application in decisions of Courts of Appeal of other circuits. Again, respondent refrains from discussing, criticizing or distinguishing any of the decisions cited by petitioners under proposition II.

Respondent presents the *ipse dixit* argument that Federal Rule 61 has no application unless it appears that the trial court erred. The grounds stated in our petition, supported by the dissenting opinion below, establish such error.

It should be further observed that respondent's response to our proposition III is based upon the wholly gratuitous and erroneous *assumption* that the court below committed no error. This is the very issue on which majority and minority in the court below were sharply divided.

Further, respondent carefully refrains from challenging petitioners' proposition III, namely, that the majority opinion below was in conflict with applicable state law. Again we observe that respondent fails to discuss, criticize or distinguish the argument or authorities found in the petition, pages 22 to 31. Petitioners contend that the case of *Milhim* v. *Hawkeye Insurance Co.*, 171 Ill. App. 262, states the controlling law of Illinois. In the Appendix to the petition we have presented comprehensive extracts from the pleadings, record and briefs in that case. Respondent's answering brief ignores the *Milhim* case. Respondent does not, and cannot deny that the *Milhim* case expresses controlling rule in Illinois, and makes no attempt to sustain Judge Finnegan's entirely erroneous analysis of that decision. In fact, throughout respondent's brief, there is a studied avoidance of discussion of Judge Finnegan's opinion, and a singular lack of argument in support of some of the startling views stated therein, all fully commented upon in our petition.

While we recognize that the granting of the pending petition for certiorari is a matter wholly within the discretion

of this Court, respondent's failure to seriously challenge any of the grounds upon which such petition is predicated persuasively suggests that compelling reasons exist for the granting of the writ.

2.

Respondent's Brief Is Predicated Upon the Erroneous Statement and Theory That the Rejected Proof Was Merely Cumulative: the Rejected Proof Was Not Cumulative, But Was the Only Evidence Offered by Petitioners Bearing Upon the Points in Question.

Respondent's brief is predicated upon a fundamental fallacy, made in the very opening paragraphs, and frequently restated (Resp. Brf., pp. 1, 2), that the rejected evidence in question was merely *cumulative. This statement is wholly without foundation.* The evidence proffered by petitioners, and rejected by the trial court, was not cumulative, but was original, primary and the *only* evidence offered by petitioners to establish the following seven uncontroverted objective facts: (a) the date that the condemnation petition was filed, (b) the time when Edlin first had knowledge of the possibility of condemnation, (c) Edlin's negotiations for payment of compensation, (d) the pendency of the condemnation suit at the time of the fire, (e) the actual condemnation award to Edlin of $43,500, (f) the acceptance of the award by Edlin, and (g) the suit brought by Edlin for $50,000 against the insurers who had insured the building.

Respondent, by his persistent argument that the general concept of "condemnation" was before the jury, tries to divert attention from the fact that seven clear-cut and separate facts were contained in the proffered evidence, establishing important elements of petitioners' case far beyond, and manifestly in addition to the "springboard"

fact that a condemnation proceeding was in existence. The remaining six elements in the offer of proof were, each in themselves separate and additional facts, and would manifestly have enabled the jury to evaluate Edlin's motive, when these facts, taken together with the suspicious circumstances surrounding the fire, were viewed in proper perspective. However, as shown in our petition, vague reference to the general concept of "condemnation" was no substitute for the seven separate and distinct facts which the petitioners sought to establish in the rejected offer of proof. The mere fact that the jury may have been told, generally, that there were condemnation proceedings affecting Edlin's real estate, could not possibly be regarded as establishing the following seven elements of the proffered offer of proof: (a) the precise date upon which the condemnation petition was filed, (b) the date when Edlin first had knowledge of the possibility of condemnation, (c) Edlin's actual negotiations for payment of condemnation compensation, (d) the fact that the condemnation suit was already pending at the time of the fire, (e) the fact that Edlin was awarded $43,500 in the condemnation, (f) the fact that Edlin had actually accepted the award of $43,500, and (g) the fact that Edlin, notwithstanding the receipt of $43,500 for his real estate, still brought action to recover $50,000 against the insurers who had insured the building, being the same building for which compensation was awarded in the condemnation proceeding, all resulting in a windfall to him of the proceeds of his building policies.

Respondent is manifestly trying to make it appear that the seven elements of the proffered evidence were but cumulative evidence. However, these seven elements were not cumulative evidence, nor were they embellishments of a fact already in evidence. They were the *only* evidence offered by the petitioners to establish the complete picture of the condemnation proceedings, and the ultimate award to Edlin,

particularly with relation to the burning of Edlin's building. Moreover, even the general concept of condemnation was effectively emasculated by the trial judge. As said by Chief Judge Duffy in his dissenting opinion below (App. p. ix):

> "The majority apparently finds no error in the rejection of this material evidence because it 'was merely a proposed embellishment of a fact already before the jury.' The trial court had ruled several times that such evidence had nothing to do with the case. In the light of such rulings how the jury could give even a limited effect to the condemnation suit escapes me."

Petitioners were never given the chance to have the jury consider the full story of the condemnation in relation to the facts showing suspicious circumstances, disclosed in the case at bar. The proffered proof was precisely of the character which has long found sanction in arson cases. The majority opinion below, unless reviewed and reversed by this Court, will have a marked tendency to throw confusion into this otherwise settled aspect of the law. The protection of the public from the threat of arson has always been a matter of major public concern. We believe that only by a review and reversal of the majority opinion below can uniformity be restored in this important aspect of the substantive law.

3.

Respondent's Brief Is Largely Founded Upon Statements of Respondent's Counsel During Arguments in the Trial Court. These Statements Were Not Supported by Any Evidence in the Proceedings Below. Respondent May Not Treat Such Gratuitous Statements as Facts Upon These Proceedings.

Respondent's brief suggests that the trial judge was fully conversant with many "facts", spelling out the details of the condemnation proceedings. Respondent's brief is largely predicated upon statements erroneously presented as though such facts were to be found in the evidence at the trial below. *This is contrary to the record.* For example, respondent, under "Material Facts," purports to state "facts" to this Court, and at page 15 of his brief, says:

> "It was then shown (Tr. 155-160) to the trial judge that the petition to condemn the property for a public housing site was filed on September 1, 1952, in the County Court, Peoria County; that in October or early November, Mr. Edlin was resisting the condemnation of his property for a public housing site through a motion to dismiss that action on the ground that there was no public need for any additional housing. [Under the Illinois Eminent Domain Act there must be a public necessity for the taking by condemnation—*City of Chicago* v. *Lehmann,* 262 Ill. 468, 104 N. E. 829.] The County Court had heard evidence for three days on this question, hearing testimony that many houses were vacant, that there were vacancies in existing public housing units. The County Court had the matter under advisement when the fire occurred on November 28, 1952. It was not until some time after the fire that the County Court overruled the motion so that on the date of the fire plaintiff did not even know whether or not there ever would be a condemnation suit. The jury

verdict for $43,500 for the land and improvements was not returned until January, 1953, and the suit by him on the fire policies on his building was not filed until some time later."

Respondent tells this Court that these "facts" are of record in the transcript, pages 155 to 160. *However, reference to pages 155 to 160 of the transcript show that the source of all of these purported "facts" were merely unsworn statements made by Mr. Cassidy, Sr., trial counsel for respondent, in the course of his argument before the trial judge, in opposition to petitioners' proffered evidence. None of Mr. Cassidy's gratuitous statements may be regarded as facts for the purpose of this proceeding.* We regard it as grossly misleading for respondent to let this Court be of the impression that the many "facts" narrated by respondent in his answering brief here found support in the evidence below.

At page 21 of his answering brief, respondent again indulges in an extended narration of purported "facts", such narration conveying the unmistakable impression that there was a foundation for such "facts" in the evidence below. Such impression is again wholly misleading. The source of such purported "facts" is again the oral argument of Mr. Cassidy, Sr., before the trial judge, when the trial judge heard argument on petitioners' offer of proof.

Notwithstanding that respondent is not entitled to treat Mr. Cassidy's statements as facts in evidence, yet such gratuitous statements found in argument, alone, and nothing more, are the basis for respondent's contentions here.

All of these statements finding their source only in Mr. Cassidy's gratuitous argument below, lack the dignity of facts, and must be disregarded here. The same is true of any argument predicated upon such undocumented statements.

FURTHER REPLY TO RESPONDENT'S BRIEF.

Respondent says (Resp. Brf., p. 20):

> "*Defendants argue, necessarily, that this evidence, and there is no more, is sufficient as a matter of law to prove that either plaintiff intentionally caused or did himself fire the building* and, therefore, it would have been competent for them to submit evidence (1) that plaintiff had a motive to set the fire and (2) that the evidence suggested in their offer of proof would have shown such a motive." (Emphasis supplied.)

Respondent has manifestly misstated petitioners' theory. Petitioners have never claimed that the evidence in the record below was sufficient, *as a matter of law,* to prove that respondent intentionally caused, or did, himself, fire the building. It has always been petitioners' theory that on the record below, that it was a question of fact for the jury to determine whether respondent was guilty of arson; but petitioners have always claimed that the *trial judge's rejection of the proffered proof as to motive erroneously foreclosed petitioners from putting in their entire case.* With the full story before them, showing the possible motive for arson, the jury might well have found for the petitioners. Petitioners were never afforded this opportunity.

Respondent makes the following statement (Resp. Brf., p. 22):

> "The petition cites no Illinois cases or authorities from any jurisdiction with application to this record which justifies their claim that the Court of Appeals' decision conflicts with either Illinois or Federal law."

This statement is wholly in error. The case of *Milhim* v. *Hawkeye Insurance Co.,* 171 Ill. App. 262, cited and discussed by petitioners at great length, clearly indicates that the majority opinion below is in direct conflict with

the controlling Illinois law, applicable to the issues raised upon the record here. The petition clearly shows that Judge Finnegan's opinion below, was in conflict with decisions of Courts of Appeal of other circuits, particularly with respect to the application of Federal Rule 61 and, more, in conflict with the long and uniformly settled law relating to the admission of evidence in arson cases.

CONCLUSION.

Respondent's answering brief is wholly devoid of any serious challenge of the grounds upon which certiorari is sought herein. The only matter for present consideration is whether or not petitioners have presented reasons regarded by this Court as sufficient to justify the granting of certiorari. We shall not burden this reply brief with comment or argument relating to the merits of the issues which may ultimately be involved, if certiorari is allowed.

Petitioners respectfully submit that in view of (1) the conflicting opinions below, and (2) the erroneous views expressed on important issues by Judge Finnegan, and vigorously opposed by Chief Judge Duffy below, there are proper and compelling reasons for the granting of the writ of certiorari by this Honorable Court.

Respectfully submitted,

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